

**BRIEF IN SUPPORT OF PETITION FOR WRITS OF
CERTIORARI.**

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the Southern District of Iowa appears at Record page 212.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit appears at Record page 270.

Denial of the Petition for Rehearing by the United States Circuit Court of Appeals for the Eighth Circuit was made without opinion and the Order appears at Record page 293.

II.

SUMMARY OF THE ARGUMENT.

1. The Circuit Court of Appeals erred in holding that petitioners had no property interest in the property condemned, because petitioners' interest in the property condemned constituted private property within the meaning of the Fifth Amendment, for which, if taken or damaged, compensation must be paid.
2. The Circuit of Appeals erred in holding that petitioners' property had not been taken or damaged.
3. The Circuit Court of Appeals erred in holding that petitioners had failed to prove their damages and that their damages were consequential and not proximate.
4. The Circuit Court of Appeals erred in denying an equitable apportionment of the condemnation award.

III.

ARGUMENT.

1.

The Circuit Court of Appeals Erred in Holding That Petitioners Had No Property Interest in the Property Condemned, Because Petitioners' Interest in the Property Condemned Constituted Private Property Within the Meaning of the Fifth Amendment, for Which, if Taken or Damaged, Compensation Must Be Paid.

The foundation of the property rights of the St. Paul in these cases is contained in the Indenture between the railroads, dated August 1, 1901, and the substantial possession derived and held by the St. Paul thereunder. The essence of the granting clause contained in Article I, Sec. 2, of this Indenture, is as follows:

"The Rock Island Company hereby grants to the St. Paul Company * * * the full, joint and equal use * * * of all that portion of said southwestern division of the Rock Island Company * * * meaning and intending hereby to include in the description aforesaid all and each portion of said railway and appurtenant property between and at the points aforesaid, and all such improvements and betterments thereof and additions thereto as shall be jointly used by the parties as hereinafter provided." (R. 87.)

The statement in the Circuit Court's opinion that "*the agreement between the parties was in form a contract and not a conveyance of an interest or estate in realty or other property*" is a definite misconception of the granting clause just quoted. The grant embodies the very words of art which are recognized universally in the law as creating an easement.

The St. Paul had a continuous line of railroad from Chicago to Kansas City, with the exception of this gap of

approximately twenty-six miles. The St. Paul wanted not merely a trackage agreement or running rights, but the right to use this line, and do business thereon, and place its property and employees thereon. The Rock Island made a definite grant of these rights in the explicit terms of the Indenture. In reliance upon this grant the St. Paul went into actual, substantial, physical possession of the railroad, together with the Rock Island, and built some two miles of railroad tracks, constructed telephone and telegraph wires, built various structures and otherwise entered into enjoyment of a possessory estate as shown in the Summary Statement.

For these property rights the St. Paul agreed, among other considerations, to pay its wheelage percentage, determined according to the use of the line, of the cost of all repairs and maintenance on each and every part of the line (R. 92).

It is true that the actual physical water damage resulting from condemnation of the Government's easement was confined to an area 23,500 feet upstream from the dam, and that the St. Paul had no independently owned structures in this area, except its telephone and telegraph wires. The Circuit Court's observations that the St. Paul was not damaged because it had no structures of its own in this 23,500 foot area constitute a failure to grasp the "property" question involved. Evidence of the grant and the St. Paul's possession and independently owned improvements was offered to establish its property interest. This point escaped the Circuit Court. That Court viewed the absence of structures independently owned by the St. Paul in the area of water damage as negativing the St. Paul's damages. The St. Paul didn't claim any such basis for damages. Its damage claim was bottomed on its obligation to contribute in cash to the cost of making the repairs where the water damage occurred.

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That the St. Paul's property interests, resting upon the facts recited, constitute private property within the Fifth Amendment, and that the Circuit Court denied to the St. Paul the guarantee of the Fifth Amendment, appears from the following decisions:

International Paper Co. v. United States, 282 U. S. 399, presented a situation where a paper mill was entitled, by conveyance and lease to use 730 cubic feet of water per second from a power company which held the right to use 10,000 cubic feet of water per second by grant from the State of New York. The Secretary of War requisitioned all of the electrical power which the power company was capable of producing. This resulted in shutting off the water power from the paper mill and caused an expense to the paper mill of \$304,685.36. This Court held that the paper mill was entitled to recover its expense as just compensation and said:

"There is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use. * * * But the Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay."

In *Duckett & Co. v. United States*, 266 U. S. 149, the Government took over the Bush Terminal in Brooklyn, including a pier which was part of the terminal. Claimant, who had the use of the pier under a lease from the owner, was required to vacate, and this Court directed an award of just compensation to him for loss of use of the pier.

Pumpelly v. Green Bay Company, 13 Wall. 166, involved

water damage to plaintiff's property as the result of defendant's dam which raised the water level of a lake. This Court said:

"But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be * * * equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken."

United States v. Lynah, 188 U. S. 445, involved the overflow of plaintiff's land by the construction of a Government dam and, applying the Fifth Amendment, this Court held:

"It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested."

United States v. Welch, 217 U. S. 333, and *United States v. Grizzard*, 219 U. S. 180, held that easements were private property within the protection of the Fifth Amendment, and must be compensated for, if taken for public use.

Monongahela Nav. Co. v. United States, 148 U. S. 312, holds that a franchise is private property within the Fifth Amendment and can no more be taken without just compensation than can tangible, corporeal property.

United States v. Wheeler Township (C. C. A. 8), 66 F. (2d) 977, presents a striking similarity to the cases at bar. The Government sought to raise the water levels in Lake of the Woods by a perpetual easement to overflow the highways in Wheeler Township, and contended the township highways were not property within the constitutional pro-

vision prohibiting the taking of property without just compensation. The raised water levels required the township to reconstruct its roads. The township demanded, as just compensation, the difference in expense between passable roads under natural lake levels and passable roads under flowage levels provided in the condemnation. The Court said:

"that easements, such as these highways, are 'property' is not open to dispute."

The opinion further states:

"Therefore, these highways cannot be taken and their use as such destroyed, without compensation under the Fifth Amendment."

Finally, the Court declared that

"the right to exoneration from the burden of constructing and maintaining a substitute way is a valuable property right, etc. * * * To the extent that this burden has been increased by this taking, there is a deprivation for which the law requires compensation."

The St. Paul submits that in the cases at bar the Circuit Court of Appeals fell into error in denying Petitioners' property rights, because it placed its dependence upon three cases which are not in point. These cases are *Union Pacific Railway Company v. Chicago, Milwaukee & St. Paul Railway Company*, 163 U. S. 564 (two cases), and *Englewood Connecting Railway Company v. C. & E. I. Ry. Co.*, 117 Ill. 611, 6 N. E. 684.

No eminent domain questions were involved or decided in the Union Pacific cases. The Fifth Amendment was not under consideration. The question in these cases was whether or not the Union Pacific could evade its responsibility under certain contracts granting use of its Missouri River bridge to the St. Paul and Rock Island, on the theory that the contracts were *ultra vires*. The court held that the contracts were valid and enforceable, and within

the powers of the Union Pacific to execute. It did not decide, nor was it called upon to decide, whether the St. Paul or Rock Island would have been permitted to share in a joint condemnation award with the Union Pacific.

Furthermore, the contracts involved in the Union Pacific cases are radically different from the one in the cases at bar. In the Union Pacific cases the grant was of the *full equal and joint possession and use of its main and passing tracks*. In the cases at bar the grant was of *all that portion of said southwestern division of the Rock Island Company, including all of said railway and appurtenant property and all improvements and betterments thereof and additions thereto* (R. 87).

The distinction is well pointed out by the language of this Court in the *Union Pacific* cases, at 163 U. S., page 583, where the Court said:

“And throughout the whole contract there does not appear to be a single provision which looks to any actual possession by the Rock Island of any of the Pacific property beyond that which was involved in its trains being run over the tracks under the direction of the other company.”

and on the preceding page this Court said:

“The company (Rock Island) had no possession before its trains came on the tracks or after they had run off of them, and while its trains were on the tracks its possession was only of the particular part occupied temporarily while running over them.”

The Union Pacific cases are wholly dissimilar on the facts, the issues, and the decisions, from the cases at bar, and the Circuit Court of Appeals clearly erred in making those cases the essential ground of its decisions in the cases at bar.

Englewood Connecting Railway Company v. Chicago and Eastern Illinois Railway Company, 117 Ill. 611, 6 N. E. 684, cited by the Circuit Court of Appeals, is not authori-

tative because in that case the Chicago and Eastern Illinois Railway was not deprived of its property or subjected to any monetary damages. It did not contribute to the repair of any damage to the railroad as the result of the condemnation and did not pay any increased amount of money for use of the railroad thereafter.

The Circuit Court's decision that the St. Paul had no property rights is at complete variance with the Record, and violates the Fifth Amendment, and is a departure from the holdings of this Court.

2.

The Circuit Court of Appeals Erred in Holding That Petitioners' Property Had Not Been "Taken" or "Damaged."

Since the Circuit Court of Appeals held that the St. Paul had no property rights in these cases, it necessarily held that there was no "taking" or "damage" to the St. Paul's non-existent property rights. The argument and the authorities in support of the first proposition discussed are equally applicable and need no repetition here.

United States v. Miller, 317 U. S. 369, *United States v. Chicago, B. & Q. R. Co.* (C. C. A. 8), 82 F. (2d) 131, and the other cases which have been discussed hold definitely that "just compensation" under the Fifth Amendment includes "damages."

The statement in the opinion of the Circuit Court of Appeals that "*the St. Paul is still enjoying the right of use acquired under the contract in all respects as it did before the condemnation proceeding*" is palpably wrong.

The St. Paul had the right, before this condemnation, to use this property without paying the cost of repairs for the damages inflicted upon it by the condemnation. The condemnation inflicted \$59,104.00 of expense on the St.

Paul, no part of which existed before, and no part of which would exist now except for the fact of the condemnation. The damage is proof of the taking.

3.

The Circuit Court of Appeals Erred in Holding That Petitioners Had Failed to Prove Their Damages, and That Their Damages Were Consequential and Not Proximate.

United States v. Miller, 317 U. S. 369, and *Monongahela Nav. Co. v. United States*, 148 U. S. 312, state the rule which is phrased in the following language taken from the former opinion:

“The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good condition pecuniarily as he would have occupied if his property had not been taken.”

In the same case the Court stated the rule governing the requirements for proof of damages:

“It is conceivable that an owner’s indemnity should be measured in various ways, depending upon the circumstances in each case, and that no general formula should be used for the purpose.”

In *United States v. Wheeler Township* (C. C. A. 8), 66 F. (2d) 977, where expense of road maintenance was increased by the flowage easement condemned, the rule was stated, on the authority of *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 328 as follows:

“When the ordinary measure of loss (decrease in actual or assumed market value) cannot be applied, as here, then ‘whatever is necessary to be considered in order to determine what is an equivalent for the appropriation of private property is germane to the question of compensation.’ * * * Here we must be

guided by this record as to what money loss will fall upon the township because of this condemnation. It is the duty of the township to maintain its roads and that duty can be enforced. * * * The right of the township and its taxpayers is to maintain such roads with the lake at natural levels and 'the right of exoneration from the burden of constructing and maintaining a substitute way is a valuable property right belonging to the group of taxpayers called a town.' * * * To the extent that this burden has been increased by this taking there is a deprivation for which the law required compensation."

The record in the cases at bar is that the condemnation did not take the railroad property, but damaged it. The damage was to the entire property, including all of the estates and rights in it.

The award was made for the sole purpose of making the repairs caused by the condemnation, and it consists of nothing else. If it were not for the necessity of repairing this damage, there would be no money in the registry of the Court. Since the exclusive source of the money in the award is the cost of repairs, therefore, the money should belong to the parties who have the obligation to pay for the repairs. They are the parties who sustained the damage.

The St. Paul has sustained an actual pecuniary hurt and a definite ascertainable loss in this condemnation. It is required to pay its share of the cost of repairs which resulted from the damages inflicted by the condemnation. If just compensation under the Fifth Amendment requires that a full and perfect equivalent be given to the parties actually damaged, then it must follow that the St. Paul is entitled to its damages in this case, because there is no question about the fact that it is hurt.

The rule that damages are consequential where property is not actually taken or damaged or where lawful govern-

mental action in the public good produces harmful consequences without an invasion of individual property rights, has no application in these cases. The decisions in *Pumpelly v. Green Bay Company*, 13 Wall. 166, and *United States v. Lynah*, 188 U. S. 445, rule out any such possibility in the cases at bar, where the invasion of the property and the infliction of the damage are undisputed.

The Circuit Court of Appeals used the term "consequential damages" in a wholly different sense, when it said:

"Any damage which the St. Paul may sustain by reason of an increase in its expenses under the contract with the Rock Island is not the proximate result of the taking of the government's easement along the Rock Island property. Such damage to the St. Paul, if any, is chargeable to the terms of the contract between the parties and is not recoverable in a condemnation proceeding. *United States v. Chicago, Burlington & Quincy Railroad Company*, 8 Cir., 82 F. (2d) 131." (R. 277.)

This statement of the Circuit Court's opinion is not sound, and is not understandable except in the light of the Circuit Court's denial of the St. Paul's property interest. The case of *United States vs. Chicago, B. & Q. R. Co.*, cited by the Circuit Court, is not the slightest authority for the quoted pronouncement.

The St. Paul's damage in these cases cannot be the result of anything else but the condemnation by the Government. If it had not been for this condemnation the St. Paul would not have been hurt. The damage is not chargeable to the terms of the so-called contract. This Indenture between the railroads (R. 86-106), which is not merely a contract, but a definite grant of a specific easement, is the basis of the St. Paul's right in this property. It is not a third party act, or act of God, or interruption in any sense of the unbroken chain of causation between the Govern-

ment's condemnation and the St. Paul's loss. It is no different than any other lease or easement. It is evidence of the act which created the St. Paul's property right.

The St. Paul is actually damaged. It is out of pocket. The loss is a money loss. The one and only cause for visiting this loss upon the St. Paul is the condemnation. Under the authorities, the St. Paul is entitled to be reimbursed for this loss, or else, in spite of the Fifth Amendment, it is turned out of court to bear its own loss, and the Rock Island is awarded this portion of the money for damages which it never sustained.

The Circuit Court's opinion says in effect that the St. Paul should have protected itself from damage by contract with the Rock Island. If the St. Paul's property was damaged so as to entitle it to compensation under the Fifth Amendment, then it should not be deprived of its rights on the theory that it had to bargain with the Rock Island to preserve the constitutional guarantee. The St. Paul certainly did not have to anticipate in entering into the Indenture of August 1, 1901 (R. 86), that some third party would thereafter damage its property in condemnation proceedings without making just compensation for such damage, as required by the Fifth Amendment.

4.

The Circuit Court of Appeals Denied an Equitable Apportionment of the Condemnation Award.

The St. Paul is of the firm belief that the damages resulting from this condemnation were fixed and determinable as of the date of the Government's taking of its easement, or as of the date of the payment of the award into the registry of the Court. (*Watson v. United States*, 34 F. Supp. 777, 779.) Therefore, the St. Paul prayed for its wheelage percentage of the total award as the amount

of damage or "just compensation" to which it was entitled (R. 24). The sum of \$59,104.00 is the St. Paul's exact wheelage percentage of the loss computed as of the time of taking or payment of the award into Court.

While the St. Paul regards this as the correct amount and prayed accordingly, it nevertheless inserted an alternative prayer in its petition (R. 24), in order to protect itself from the inequitable conduct threatened by the Rock Island. Exhibit 5 (R. 120), shows that the Rock Island, by making a line change over part of the area affected, instead of making the repairs as originally contemplated, has actually caused a loss to the St. Paul of \$72,022.00 (Exhibit 5, R. 120). This figure is arrived at by adding the following items:

- (1) \$18,020, being the sum of money, which, if presently invested at the legal rate of interest and expended with principal and interest over the unexpired term of the indenture, would produce an amount sufficient to pay two per cent per annum, for the unexpired term of the indenture, on the net increase in the investment account resulting from the line change.
- (2) \$37,772, being the sum that would be charged as wheelage proportion on the service loss resulting from the retirement of the old line.
- (3) \$16,230, being the sum that would represent the wheelage proportion of \$35,010, the estimated cost of remedial and protective repairs to that portion of the line not relocated.

Thus it will be seen that as a result of this condemnation, \$59,104.00 is the minimum damage to which the St. Paul will be subjected. The Rock Island has always contended that, as owner of the fee, it is entitled to all of the award, and that it is no concern of the St. Paul that the Rock Island is fortunate enough to collect \$127,539.00

from the Government in the condemnation suit. It will attempt to hold the St. Paul liable under the indenture for its wheelage proportion of the damages, which will already have been paid in full by the Government. This means double compensation for the Rock Island and no compensation for the St. Paul. Clearly, the equities are not with the Rock Island in this respect.

While no case has been found in this Court holding that an apportionment of a condemnation award is an equitable proceeding and rival claimants must be required to do equity, there is authority in other courts for this rule. *Turner v. Woodward*, 259 Fed. 737, from the First Circuit, where rival parties claimed the fund deposited in court, the rule was announced as follows:

"The proceedings before the court were not, as already indicated, legal, they were equitable. The distribution of this fund was a proceeding in equity; this is now conceded by all counsel."

See also *Cobo v. United States*, 94 F. (2d) 351; *United States v. Klink, et al.*, 3 F. Supp. 208; *Law v. Chicago Sanitary District*, 197 Ill. 523, 64 N. E. 536; and *State v. Lewis County*, 80 Wash. 417, 141 Pac. 906.

Conclusion.

The \$127,539.00 deposited by the Government in the registry of the District Court represents the actual cost of repairs which would be required to place the railroad in question in as good, safe and efficient condition as it was before the condemnation. Obviously, this money should go to those required to bear the cost of making such repairs, which cost, under the indenture, is prorated between the parties on a wheelage basis. The Government, in agreeing to this award, did not intend to enrich the Rock Island at the expense of the St. Paul. It intended, on the

contrary, to make both parties whole. This result cannot be accomplished unless the St. Paul is awarded its proper share of this award in these proceedings. If the Rock Island prevails in this case, it will succeed in having its damages paid twice, first by the Government and then by the St. Paul to the extent of the wheelage proportion under the indenture. For the reasons stated, Petitioners respectfully submit that writs of certiorari should be granted in these causes, and the decisions of the Circuit Court of Appeals herein should be reviewed by this Honorable Court and reversed.

Respectfully submitted,

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FILED

JAN 5 1944

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 526

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY, ET AL., *Petitioners*,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY, ET AL., *Respondents*.

No.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
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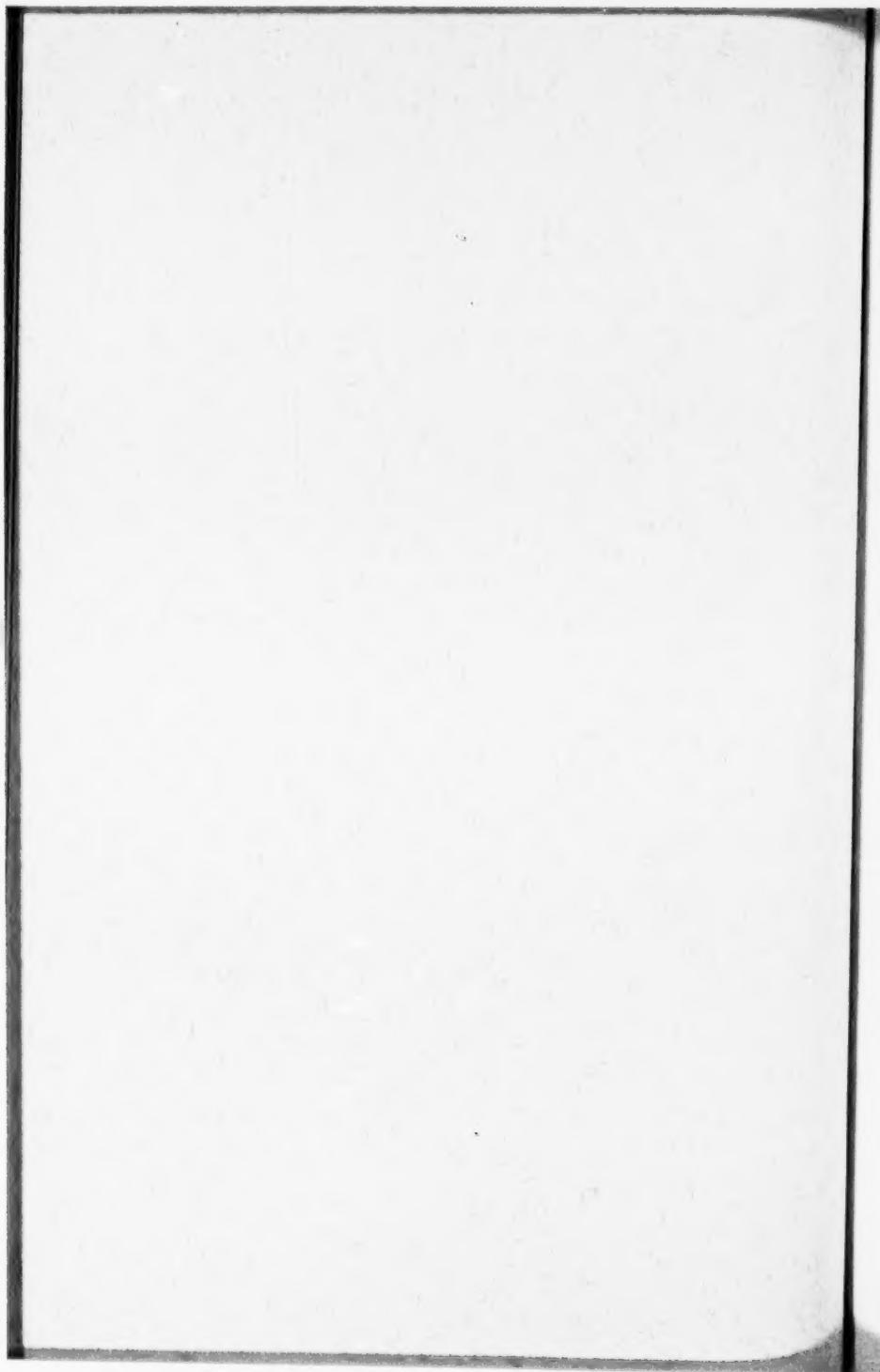
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RESISTANCE TO PETITION FOR WRITS OF CERTIORARI.

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STATEMENT OF THE CASE.

Petitioners' summary statement of the matter involved correctly recites the history of the litigation, and the manner in which the controversy arose. It omits many important facts, and we, therefore, substitute the following statement in lieu of that appearing at pages 3-7 of the petition: (The statements concerning a substantially identical trackage contract at St. Paul, Minnesota, and the position taken by petitioners in that case, are not found in petitioner's statement).

The Davenport-Muscatine Trackage Agreement.

On August 1, 1901, The Chicago, Rock Island, and Pacific Railway Company (hereinafter called the Rock Island), being the unqualified owner of a line of railroad on the west side of the Mississippi River between Davenport and Muscatine, Iowa, entered into an agreement with the Chicago, Milwaukee, and St. Paul Railway Company (herein-after referred to as the St. Paul), by which the Rock Island, for a term of 99 years from and after June 30, 1903, granted to the St. Paul

“the full, joint, and equal use in common with the Rock Island Company, and such other company or companies as the Rock Island Company shall at any time permit to use the same or any part thereof, * * * that portion of the Southwestern Division of the Rock Island Company extending from a point at B. C. R. & N. crossing about two miles west of Davenport Station to a point in Warren Street in the City of Muscatine, Iowa.” (Record 86-106)

The Rock Island contracted to maintain the property; to employ all necessary agents, servants, and employees, and to require them to give the same attention to the business of the St. Paul Company as to its own business. (Record 89) The Rock Island was to prescribe schedules of trains, and rules and regulations for the operation of the railway, which were to accord equality of right and privilege to all trains of the same class operated by each party. All trains were to “move under and in accordance with the orders of the superintendent or train dispatchers of the Rock Island.” (Record 93-94)

The St. Paul agreed to perform no switching for any other railway company upon any of the tracks, unless the written consent of the Rock Island was first secured. (Record 96) If the St. Paul desired additional side or spur tracks, or additional facilities, not existing at the date of the agreement, it might give notice of such desire to the Rock Island, and the Rock Island then might construct or provide such facilities, or permit the St. Paul so to do, which facilities the Rock Island might, at its option, purchase by paying the cost. (Record 94-95) The St. Paul, after 10

years, by giving 5 years' notice in writing, may terminate the contract entirely. (Record 102-103)

The St. Paul agreed:

A. To pay 2% annually upon an agreed valuation per mile of track, the rate to be reduced in the event the Rock Island permitted any other railway company to use the railroad involved.

B. To pay one-half of all taxes and assessments levied upon the railway, subject to a like qualification.

C. To pay 2% annually upon the cost of all additions and permanent betterments, which the Rock Island might make upon the railway, including additional tracks, viaducts, bridges, subways, works, and appliances, and subject to a like qualification.

D. A pro rata proportion of the cost of maintaining and repairing the railway, to be determined by computing the ratio which the number of miles run by engines and cars of all classes by the St. Paul Company over the railway shall bear to the whole number of miles run by engines and cars of all classes operated by all companies using the railway.

E. A similar pro rata proportion of salaries paid to certain division officers of the Rock Island. (Record 89-93)

In connection with the improvement of the upper Mississippi, in aid of navigation, the United States constructed a dam in the Mississippi River about one mile above Muscatine. This dam raised the water level of the Mississippi River, and the Secretary of War, under express statutory authority, filed in the district court a petition, which sought the condemnation of a "flowage easement, extending from dam No. 16, about one mile above Muscatine, Iowa, upstream to dam No. 15 at Davenport." All actual physical damage to the line of railroad involved occurred within 23,500 feet immediately above lock and dam No. 16 (Record 28). As the city of Muscatine is below the dam, the railway property at that point was not affected. (Record 33)

Nahant Station, at which the St. Paul Company owns extensive terminal facilities, part of which are located upon Rock Island property, is approximately 21 miles upstream from lock and dam No. 16. The property of the St. Paul at Nahant was not affected by the dam. The St. Paul Company never constructed or owned any tracks, structures, or other facilities of its own within 5 miles above the dam. (Record 64-65) It owned telegraph and telephone wires upon the poles of the Rock Island, which it maintained. The Rock Island has not granted to any other company the right to use any portion of the railway involved.

The St. Paul's wheelage proportion of the total traffic moving over the line of railway in question varies from month to month. The average percentage of the St. Paul's wheelage use of the line involved from March 1, 1920, to August 1, 1941, both dates inclusive, was 47.683%. Prior to March 1, 1920, the St. Paul's proportion was somewhat less, and it was stipulated that the average percentage for the period of time from the effective date of the trackage agreement to March 1, 1920, would be 45% (Record 47-48), and the average percentage for the entire period of time from the effective date of the trackage agreement to August 1, 1941, "would be 46-346%". An award of \$127,539 was made by the condemnation commissioners. This award was confirmed by the district court, and paid into the registry of that court by the United States.

The St. Paul, Minnesota, Trackage Agreement.

On May 31, 1902, the St. Paul Company, being the owner of a line of railroad at St. Paul, Minnesota, granted to the immediate predecessor in interest of the Rock Island, for a term of 99 years the

"right of use in common with the St. Paul Company, and with such other company or companies as the St. Paul Company shall at any time permit to use the same, for the sole purpose of running thereon its trains of all classes, the main track and such passing tracks of its 'River Division' as the St. Paul Company may from time to time designate."

The St. Paul Union Depot Company in 1916 required certain portions of the real estate upon which the tracks described in the St. Paul, Minnesota, trackage agreement were laid, for the construction of a new union passenger terminal station. By deed dated September 18, 1916, which recited a cash payment of \$433,072.90, the St. Paul Company conveyed portions of the real estate upon which these tracks were located to the St. Paul Union Depot Company. The deed obligated the grantee, "at its own cost and expense," to construct for the use of the St. Paul Company two elevated tracks to be supported upon an earth fill, retained by adequate retaining walls, and connected with the existing tracks of the St. Paul Company. (Record 168-181) The Rock Island received no part of the consideration paid for this conveyance by the St. Paul Union Depot Company (Record 72), but, after the construction was completed by the Union Depot Company, at a cost to it of \$474,000, the Rock Island used the relocated tracks under the terms of the May 31, 1902, trackage agreement. The St. Paul Company demanded that the Rock Island pay 2% per annum on the cost to the Union Depot Company of elevating these tracks and constructing retaining walls. (Record 75) The Rock Island refused to pay, and the controversy was settled by a letter agreement signed by the Vice President and General Counsel of the St. Paul and the Assistant General Counsel of the Rock Island, dated September 10, 1934, and reproduced at Record 191-196. After this settlement, the Rock Island paid 2% per annum upon \$474,174, as stipulated in Exhibit N (Record 75). The trial court excluded all evidence pertaining to the St. Paul, Minnesota, trackage agreement and the construction of that instrument adopted by the parties, as irrelevant and immaterial (Record 223).

The trial court made findings of fact, and stated its conclusions of law in a memorandum opinion (Record 212-223). The trial court held:

"The grant in the contract to the St. Paul was at least an easement, and for the taking of an easement compensation is to be paid." (Record 214)

The court further found:

"The St. Paul introduces no evidence as to any damage to the tenancy, nor to any interference with its use, nor to any interference or damage to the easement, and, therefore, is not entitled to any damages by the taking or for interference with such tenancy or easement." (Record 215)

"I am satisfied that the St. Paul is not entitled to damages growing out of the provisions of its agreement with the Rock Island, unless there was in fact a taking of the contract itself. (Record 217) * * * The St. Paul has proven a taking of certain rights in and to the real estate condemned, but, having failed to show actual damages, is still entitled to nominal damages." (Record 219)

Both parties appealed to the Eighth Circuit Court of Appeals, which held, on the strength of *Union Pacific Railway Co. v. C. R. I. & P. Ry. Co.* and *Union Pacific Railway Co. v. C. M. & St. P. RR. Co.*, 163 U. S. 564, 41 L. Ed. 265, 16 Supreme Court 1173, and *Englewood Connecting Ry. Co. v. Chicago & Eastern Illinois Railway Co.*, 6 N. E. 684, 117 Ill. 611, that the St. Paul had no estate or interest in the Rock Island property sufficient to support an award of damages. That court further held:

"The district court was correct in finding that the evidence failed to show that the St. Paul sustained actual damages as the result of the condemnation proceeding; that the United States by acquiring the easement to overflow the property of the Rock Island has not taken the contract under which the St. Paul has the right to use the Rock Island property subservient to the easement."

The Circuit Court of Appeals concluded:

"The decree of the district court was erroneous only in so far as it determined that the St. Paul had a sufficient interest in the Rock Island property to justify a participation in the award to the extent of \$100.00. The decree should have provided that the entire award be turned over to the Rock Island. On remand, the district court will modify its decree accordingly, and, as so modified, it will stand affirmed."

REASONS WHY THE WRIT SHOULD NOT ISSUE.

I.

Review upon certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

Rule 38 of this court.

Certiorari will not be granted except in a case involving principles, the settlement of which is of importance to the public, as distinguished from the parties, or in a case where there is a conflict of opinion and authorities between Circuit Courts of Appeal, or between a Circuit Court of Appeals and this Court, or where the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, or has decided an important question of federal law, which has not been, but which should be, settled by this court. None of these reasons are present in the case at bar.

Rule 38 of this court.

Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387.

Hamilton Brown Shoe Co. v. Wolf Bros., 240 U. S. 251.

Magnum Import Co. v. Coty, 262 U. S. 159.

United States v. Johnston, 268 U. S. 220.

Houston Oil Co. v. Goodrich, 245 U. S. 440.

II.

The Muscatine trackage contract, conveyed to the St. Paul Company no estate or interest in the real estate of the Rock Island. Under that instrument the St. Paul became neither a tenant in common nor a lessee of the Rock Island. The St. Paul was granted no easement in Rock Island property, but merely a trackage license. The St. Paul had no estate or interest in the Rock Island property sufficient to support an award of damages in its favor.

Union Pacific Ry. Co. v. The Chicago, Rock Island, and Pacific Ry. Co., The Chicago, Milwaukee, St. Paul Railroad Co., et al., 163 U. S. 564, 41 L. Ed. 265.

Englewood Connecting Ry. Co. v. Chicago & Eastern Illinois Ry. Co., 6 N. E. 684, 117 Ill. 611.
Stickland v. Pennsylvania Railroad Co., 154 Pa. 348, 21 L. R. A. 224.
Clapp v. Boston, 133 Mass. 367.

The interest of the St. Paul in the Rock Island property was, at best, no more than an inchoate right to obtain an easement under certain conditions, somewhat comparable with the dower right of a spouse in real estate. An inchoate right of dower does not constitute an estate in property for which compensation must be paid upon the taking of the property by eminent domain.

18 *American Jurisprudence* 862.
Matthewson v. Skinner, 66 Kansas 309, 71 Pacific 580.
McCullough v. Edwards Elec. Co., 165 N. W. 157 (Neb.).

III.

Both the district court and the circuit court of appeals correctly held that the St. Paul failed to prove that its property interests were damaged, or the extent of its damages, if any. Proof of damage to, or the taking of the property of the Rock Island was not proof of damage sustained by the St. Paul.

Omnia Company v. United States, 261 U. S. 502.

IV.

Where several contracts relating to the same general subject matter have been entered into by the same parties, the construction of one instrument, or particular language therein, by the parties themselves is entitled to almost controlling weight in construing the same contract, or contracts of the same series, between the same parties.

17 *C. J. Sec.*, Page 764.
Pullen's Will v. Pullen, 165 N. W. 25 (Wis.).
Thompson v. Baker, 203 N. W. 195 (N. Dak.).
Tilden Company v. Densten Hair Co., 103 N. E. 916.
Copenhaver v. United Fuel Gas Co., 156 S. E. 884.
Bowers Hydraulic Dredging Co. v. United States, 211 U. S. 176, 53 L. Ed. 136.

ARGUMENT.

I.

Review upon certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

Counsel for petitioners seem to assume that their client is entitled to a review of the decision below as a matter of right. This assumption is clearly erroneous, and in conflict with the rules and decisions of this court. The primary question presented by this case is the proper construction of a contract between two railway companies, involving a line of railroad in eastern Iowa. It is not even claimed by counsel for petitioners that any question of public importance is presented by this case. It is not claimed that the decision of the 8th Circuit Court of Appeals is in conflict with the decision of any other circuit court of appeals, or with the decision of the highest court of any state. It is not claimed that the 8th Circuit Court of Appeals failed to follow, or apply, applicable local decisions upon questions of local law. In short, the position of counsel is that petitioners, merely because they invoke the Fifth Amendment to the United States Constitution, are entitled to have the decision below reviewed by this court.

It may be conceded that this case involves an unusual and interesting legal question, but even so, it does not follow that the case calls for a review by this tribunal. Both the rules and decisions of this court require that the petition for certiorari be denied.

In *Layne & Bowler Corp. v. Western Well Works*, 261 U. S. 387, in dismissing a writ of certiorari as improvidently granted, this court, speaking by the late Chief Justice Taft, said:

"It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."

In *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U. S. 251, this court, speaking of the exercise of its jurisdiction to review the decisions of inferior courts by certiorari, said:

“As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance or in order to secure uniformity of decisions.”

Again in *Magnum Import Company v. Coty*, 262 U. S. 159, this court, in discussing the exercise of its supervisory powers over the decisions of Circuit Courts of Appeal, said:

“The jurisdiction to bring up cases by certiorari from Circuit Courts of Appeals was given for two purposes: first, to secure uniformity of decisions between those courts in the nine circuits (now 10); and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing.”

In view of these pronouncements, and mindful of the heavy responsibilities imposed upon the members of this court, we submit, that upon the face of the petition, it should be denied because there is no showing that the case is of such character that the decision below ought to be reviewed by this court, in the public interest, as distinguished from the purely private rights of the parties litigant.

II.

The Muscatine trackage contract conveyed to the St. Paul Company no estate or interest in the real estate of the Rock Island. Under that instrument the St. Paul became neither a tenant in common nor a lessee of the Rock Island. The St. Paul was granted no easement in Rock Island property, but merely a trackage license. The St. Paul had no estate or interest in the Rock Island property sufficient to support an award of damages in its favor.

The decision of the Eighth Circuit Court of Appeals was obviously right and proper, and we shall not burden this

court with any extensive argument in support thereof. It is fundamental, of course, that the owner of every estate in real property appropriated by the power of eminent domain is entitled to just compensation therefor. It is equally fundamental that a mere licensee, or one having only contractual rights with respect to property, is not entitled to share in an award of compensation, particularly where his rights are in no way taken or interfered with.

The trackage agreement between the Rock Island and the St. Paul is not a lease. This court in the *Union Pacific* case, *supra*, stated that a similar contract, although denominated by the parties as a "lease", was "a mere running arrangement", or "trackage contract". The Rock Island remains at all times in full and unqualified possession of its property with all of the rights, duties, privileges, and burdens of ownership. It may extend to others the same, or greater privileges than have been extended to the St. Paul Company. The Rock Island makes and prescribes schedules, rules, and regulations, governing the operation of the railway. All employees of the St. Paul Company while upon the Rock Island tracks are at all times as much subject to the orders of the Rock Island dispatchers and superintendent as are the employees of the Rock Island, itself. In short, the situation is no different from that which would obtain had the St. Paul surrendered its trains to the Rock Island for operation between the terminal points covered by the trackage agreement.

Counsel for petitioners cite no authorities in support of their contention that the instrument in question makes the St. Paul a tenant in common with the Rock Island. The cases of *Englewood Connecting Railway Company v. Chicago & Eastern Illinois Ry. Co.*, 117 Ill. 611, 6 N. E. 684, and *Union Pacific Ry. Co. v. C. M. & St. P. R. R. Co., et al.*, 163 U. S. 564, 41 L. Ed. 265, squarely hold that contracts of the character now before this court convey no estate in realty, and it, therefore, follows that the using company would have no right to participate in a condemnation award. The decision of the Circuit Court of Appeals that the St. Paul Company held no estate in the property of the Rock Island, which required that the St. Paul be compensated, was clearly correct, and no occasion exists to have that pronouncement reviewed by this court.

III.

Both the district court and the circuit court of appeals correctly held that the St. Paul failed to prove that its property interests were damaged or the extent of its damages, if any. Proof of damage to or the taking of the property of the Rock Island was not proof of damage sustained by the St. Paul.

The St. Paul made no effort to establish upon the trial of the case that it had been deprived of the use of any part of the railway involved. It simply took the position that since the United States paid money with the expectation that it would be expended for the rehabilitation of the Rock Island's tracks, the fund should be treated as a part of the cost of maintaining the line of railroad. The St. Paul further urges that since it is obligated by the contract to contribute to the maintenance of the whole line of railroad, its damages may be ascertained by striking an average of the monthly percentage proportions, paid by the St. Paul for many years past, for maintenance and repairs. The Circuit Court of Appeals properly rejected this contention, for it is established that the St. Paul's use of the property has never been interfered with or denied in any way. St. Paul trains have at all times operated over the line of railroad involved without interference. The United States did not condemn the contract, or the contractual rights of the St. Paul to the use of this line of railway. By the condemnation award the United States obtained no right to have its trains operated over the tracks of the Rock Island under the terms and conditions of the trackage agreement. The contract, as both courts below properly ruled, was, in no sense, taken by the condemnation proceeding.

The contentions of the St. Paul Company are squarely answered by the decision of this court in *Omnia Co. v. United States*, 261 U. S. 502. There, the Omnia Company had entered into a contract with the Allegheny Steel Company, by which it became entitled to receive the entire output of that corporation for the year 1918. The Government requisitioned the entire manufacturing capacity of the Allegheny Steel Company for the year 1918 for war purposes. The property taken was that of the steel company,

but the contract was not condemned. The inability of the Allegheny Company to comply with its contract by delivering its output to the Omnia Company was a consequential loss, or injury, resulting from lawful governmental action. For such consequential loss or injury the Government was not liable.

In this case, if it be conceded that the action of the Government in flooding the Rock Island property imposed upon the St. Paul an additional cost of complying with its contractual obligations with the Rock Island, that was a consequential loss or injury and not a legal damage. No rule of law requires that the St. Paul be indemnified against such expense by awarding it a portion of the funds paid by the Government to the Rock Island.

The cases of *International Paper Co. v. United States*, 282 U. S. 399, *Duckett & Co. v. United States*, 266 U. S. 149, *Pumpelly v. Green Bay Co.*, 13 Wall. 166, and *United States v. Wheeler Township*, 66 Fed. 2d 977, are clearly distinguishable. In the *International Paper Company* case petitioner was entitled to the unrestricted use of certain waters of the Niagara River, a right, which, by the statutes and decisions of the State of New York, constituted real estate. The Secretary of War requisitioned all of the water, and directed that it be used to produce power for war industries. In the *Duckett* case a lessee of two piers of the Bush Terminal in Brooklyn, New York, was dispossessed by the Government. Both these cases are clearly distinguishable from the case at bar. In *United States v. C. B. & Q. Ry. Co.*, 82 Fed. 2d 131, and *United States v. Wheeler Township*, 66 Fed. 2d 977, it was held that the raising of the water level in navigable waters by the action of the Government in constructing dams entitled the owner of the property damaged to just compensation. No question of the character here presented was involved in either case.

IV.

Where several contracts relating to the same general subject matter have been entered into by the same parties, the construction of one instrument or particular language therein by the parties themselves is entitled to almost controlling weight in construing the same contract or contracts of the same series between the same parties.

Upon the trial in the district court, respondents introduced evidence, which established that at St. Paul, Minnesota, the Rock Island used certain tracks of the St. Paul Company under instruments substantially identical with the trackage agreement between Davenport and Muscatine, Iowa. The St. Paul Company construed the St. Paul, Minnesota, trackage agreement as vesting no interest in the Rock Island, for the undisputed evidence is that the St. Paul sold the real estate covered by the St. Paul trackage agreement and received all of the proceeds therefrom, without accounting to the Rock Island for any portion thereof. Not only did the St. Paul Company pocket all of the proceeds from the sale of the real estate, but the record shows that, in addition, the St. Paul Company required the Rock Island to pay 2% per annum upon sums expended by the St. Paul Union Depot Company to reconstruct and elevate tracks of the St. Paul Company, and construct retaining walls.

The trial court excluded this evidence as immaterial. The Circuit Court of Appeals did not find it necessary to pass upon the admissibility of this testimony. Counsel for the St. Paul Company, in this court, invoke the rules of equity, which they insist are applicable to a proceeding of this character. It is fundamental, of course, that "he who seeks equity must do equity," and that "he who seeks equity must come with clean hands."

We believe that this evidence was clearly admissible; that since the St. Paul, Minnesota, contract related to the use of St. Paul Company tracks by the Rock Island, the construction placed by the parties upon the St. Paul, Minnesota, trackage agreement was entitled to almost controlling weight in construing substantially identical provisions in other contracts entered into between the same parties

within a few months thereafter. If equitable principles are to be applied, the necessary result will be that the claims of the St. Paul to share in the fund in the registry of the court must be denied.

CONCLUSION.

The petition for writs of certiorari in these cases should be denied:

First, because the case presents no question of public importance, which requires a decision of this court to authoritatively determine. The question presented is not likely to recur. The case involves no question of public interest as distinguished from the private rights of the parties.

Second, the decision of the Eighth Circuit Court of Appeals was clearly correct and in accord with the only cases on the subject. This court, if certiorari be granted, would, of necessity, arrive at the same conclusion as did the Circuit Court of Appeals.

The decision below is right and no occasion is presented for a review thereof by this tribunal. It follows that the petition for writs of certiorari should be denied.

Respectfully submitted,

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